103

No. 08-204

Supreme Court, U.S.
FILED
OCT 16 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DAWN V. MARTIN, Esquire,

Petitioner,

v.

HOWARD UNIVERSITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION FOR RESPONDENT HOWARD UNIVERSITY

BRIAN L. SCHWALB
Counsel of Record
KISHKA-KAMARI M. FORD
VENABLE LLP
575 7th Street, NW
Washington, D.C. 20004
(202) 344-4823

Counsel for Respondent Howard University

218806

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether the court of appeals correctly affirmed the district court's grant of summary judgment narrowing petitioner's retaliation claim, and the jury's subsequent verdict that petitioner failed to prove her sexual harassment, retaliation and breach of contract claims.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
STATEMENT	1
REASONS FOR DENYING THE PETITION	10
1. The Court Of Appeals Correctly Affirmed The Sexual Harassment Verdict	11
2. The Court of Appeals Properly Reviewed The Disposition of Martin's Retaliation Claims	16
3. Petitioner's Remaining Arguments Provide No Basis For Further Review	20
CONCLUSION	23

TABLE OF CITED AUTHORITIES

Page

CASES

Singleton v. Wulff, 428 U.S. 106 (1976) 20, 21

STATUTES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) *et seq.* Pet. App. A-240 1

District of Columbia Human Rights Act, D.C. Code, § 2-1401.01 *et seq.* 1

As explained more fully below, the University disagrees that the EEOC Guidelines, 29 C.F.R. § 1604.11(e) and Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621-634, *et seq.* are applicable in this case.

STATEMENT

This is the latest, and hopefully final, chapter of petitioner Dawn Martin's long-running attempt to force her way into a tenure-track position at Howard University's Law School. A jury in the U.S. District Court for the District of Columbia, after a multi-week trial, concluded that Howard University had not violated petitioner's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), *et seq.* or the District of Columbia's Human Rights Act, D.C. Code, §§ 2-1401.01, *et seq.*, and that petitioner had not proven that she had a contractual right to continued employment at the Law School after her two-year visiting position expired. Despite the petition's mischaracterization of the facts and legal issues that were actually before the trial court and jury in this case, there are no questions worthy of certiorari. The petition should be denied.

This case does not present any important unresolved or novel legal question, and creates no split with either this Court's precedent or with decisions in other circuits. Rather, it is a straight-forward employment dispute arising out of a visiting law professor's unsuccessful efforts to obtain a tenure-track teaching position after her two-year contract ended. The district court, with considerable patience and deference, ensured that Martin had a fair opportunity to present her evidence

and arguments to the jury. After hearing all of the evidence, the jury concluded that Martin failed to prove any of her claims (which included sexual harassment, retaliation and breach of contract). The district court confirmed the jury's verdict, denying Martin's post-trial motions in a well-reasoned published memorandum opinion. Pet. App. A-138 – A-158. Martin appealed, and after extensive briefing and oral argument, the Court of Appeals for the District of Columbia Circuit affirmed, explaining its reasoning in a detailed (but unpublished) opinion. Pet. App. A-2 – A-12.

Most of the 16 "questions" Martin now purports to present in her petition were not presented to the jury or the trial or appellate courts below. Indeed, rather than focusing on the factual record established after extensive pre-trial discovery and through the presentation of evidence at trial, the petition brazenly directs this Court to petitioner's untested (and ultimately unproven) version of the facts as she alleged them in her 1998 complaint (Pet. App. 5, FN. 4). The petition also improperly directs this Court to evidence that was excluded at trial and never before the jury, specifically an affidavit from an individual whom the University was not able to cross-examine. Pet. App. A-213 – A-216. This document was specifically excluded from evidence at trial and should not have been presented to this Court in petitioner's appendix.

The district court detailed the relevant facts, as they were established at trial, in its decision denying Martin's post-trial motions:

> Plaintiff Dawn Martin, a Visiting Professor at Howard University School of

Law from July 1996 through May 1998, brought this action against several defendants on May14, 1999. . . .

Plaintiff alleges that she was the victim of a hostile work environment in violation of Title VII and the District of Columbia Human Rights Act as a result of the conduct of Mr. Leonard Harrison, a homeless person who was neither an employee of, nor a student at, Howard. Specifically, Mr. Harrison sent Plaintiff two letters that were hand-delivered to Plaintiff's office, left voice mail messages for her, and attempted three personal visits to Plaintiff's office (Plaintiff was only in her office during the third visit and Harrison was chased out by a security officer), and at one point stated that he thought Plaintiff was his wife. Plaintiff has claimed that Howard's response and inaction towards Mr. Harrison is a violation of Title VII. Plaintiff's other two claims include retaliation in violation of Title VII and breach of contract. Plaintiff asserted that because of her complaints regarding Mr. Harrison and her requests for protection from Mr. Harrison, the administration retaliated against her in several ways. . . . [First,] the then Dean of the law school, Dean Bullock, got the Appointments, Promotions and Tenure Committee ("APT Committee") to not recommend Plaintiff for the EEO/Labor Law tenure-track position she sought and to instead recommend Professor Cunningham, and [second,] that Dean Newsom sent Plaintiff

> a letter asking her to vacate her office early, in May 1998, rather than in June or July 1998 when most professors had to leave. Plaintiff also alleges she had an oral contract that her . . . visitorship would be renewed until a tenure-track position became available, at which time she would get that position. Plaintiff alleged the contract was breached when she was not selected for any tenure-track position.

Pet. App. A-2 – A-3.

Shortly after Martin filed her complaint, and long before trial, in a Memorandum Opinion dated December 16, 1999, the district court (C.J. Thomas F. Hogan) dismissed Martin's intentional infliction of emotional distress claim, as well as her claims against former Dean Alice Gresham-Bullock and then University President Patrick Swygert in their personal capacities; however, the district court denied Howard's motion to dismiss Martin's sexual harassment, retaliation and breach of contract claims. Pet. App. A-19 – A-38.

After discovery and numerous motions, the district court granted, in part, summary judgment in favor of Howard on Martin's retaliation claim, narrowing that claim to two alleged adverse employment actions: the decision not to select her in December 1997 for the tenure-track position teaching equal employment opportunity (EEO) and labor law, and the purported "eviction" of Martin from her office in May 1998 when her two-year visitorship ended. The district court concluded that Martin's contention that Dean Bullock

had "converted" a possible Constitutional Law/Civil Rights Law class into a Tax Law class did not constitute an "adverse employment action," and thus, granted summary judgment against Martin on that aspect of her retaliation claim.

Trial before a jury began on April 4, 2006, and lasted for nearly four weeks. During her case-in-chief, Martin called as witnesses, among others, former Dean Bullock, Associate Dean for Academic Affairs Michael Newsom, all five law school faculty members on the Appointments, Promotions and Tenure ("APT") Committee responsible for recommending law school hires, including tenure-track positions. At trial, Chief Judge Hogan permitted Martin to discharge two separate attorneys and eventually represent (and conduct her own direct examination) *pro se*. Although he repeatedly expressed concern over her use of her allotted time, Chief Judge Hogan nevertheless repeatedly awarded Martin extra time to present her case.

After listening to the testimony of seventeen witnesses over thirteen days and considering over 150 exhibits admitted into evidence, the jury returned a verdict in favor of the University on all counts. Of particular significance, the jury concluded that Martin had not proven that Mr. Harrison's conduct was sexual in nature or "because of" Martin's gender. The jury also concluded that Martin had not proven that the APT Committee intentionally retaliated against her when it did not recommend her for the EEO/Labor Law tenure-track position, or that Dean Newsom's request that she vacate her office was an act of retaliation. Finally, the jury concluded that Martin had not proven that she had

a contractual right to remain employed at the law school when her two-year visitorship ended.

Martin filed post-trial motions for judgment and for a new trial which the district court, by Memorandum Opinion dated October 4, 2006, denied. *See* Pet. App. A-138 – A-158. As she did in her appeal (and now does again in her petition), Martin argued in her post-trial motions that the jury should have been instructed as a matter of law and/or as "law of the case" that Mr. Harrison's conduct was sexual in nature and was because of her gender. According to Martin, this instruction was compelled by the district court's ruling back in December 1999 denying the University's motion to dismiss the harassment count of Martin's complaint. In his post-trial Memorandum Opinion, Chief Judge Hogan explained in detail his reasoning for denying Martin's post-trial (and pre-trial) motions, including that his 1999 opinion denying Howard's motion to dismiss did not make factual findings, but merely concluded that Martin's complaint could not be dismissed before she had an opportunity to try to prove her case. Pet. App. A-145. Chief Judge Hogan reiterated that the question of whether Mr. Harrison's conduct was sexual in nature or because of Martin's gender was a factual question that needed to be presented to the jury to resolve. Pet. App. A-145 – A-146. In his post-trial Memorandum Opinion, Chief Judge Hogan found "no basis" for Martin's claim that he had previously taken judicial notice that Mr. Harrison's conduct was sexual in nature. Pet. App. A-145. Chief Judge Hogan went on to observe that Martin's arguments for judgment on her retaliation claim notwithstanding the jury verdict "border on frivolous," (Pet. App. A-150), and that Martin's

argument that the jury would have found Howard's reasons for not hiring her for the EEO/Labor Law position pretextual and false if given the chance "tenuous and speculative." Pet. App. A-153. Chief Judge Hogan found Martin's criticism of the jury instructions on what constitutes an adverse employment action "disingenuous and misleading." Pet. App. A-154. He admonished Martin for "wast[ing] time" discussing issues in her post-trial motions that the jury never even confronted or reached. Pet. App. A-155.

Although she was never a full-time member of the law school faculty or selected for a tenure-track position, Martin, on appeal, asked the Court of Appeals for the District of Columbia Circuit for "reinstatement, as a tenured, full professor, with back pay (including benefits and sabbatical)." Appellant Br. at 45. Following significant briefing – including an *amicus brief* from the National Association of Women Lawyers – the court of appeals affirmed. Pet. App. A-1 – A-12. Martin's motion for rehearing en banc was denied. Pet. App. A-13.

The University wishes to correct certain material factual misstatements in Martin's petition:

- The University *did not* recruit Martin as she alleges in her petition. Pet. App. 5. Rather, the evidence at trial was that Martin contacted the University in March 1995 stating that she wanted to leave her position at Cleveland-Marshall School of Law and return to the Washington, D.C. area due to problems her teenage daughter was experiencing at school and with her health. JEX 120.

- The University *did not* promise Martin that it would "convert" her visiting position into a tenure-track position when one became available as she alleges in her petition. Pet. App. 5. In fact, the jury rejected this assertion. The evidence at trial established that Martin knew – and acknowledged in her own contemporaneous written communications with Howard – that what the Law School (through Professor Taslitz) had offered her was a two-year visitorship with no guarantee of renewal. The jury specifically responded "NO" when asked the following on the jury verdict form:

> "Did the Plaintiff prove by a preponderance of the evidence that Professor Taslitz promised her employment with the University would continue after the expiration of her two-year visitorship, either by giving her a tenure-track position or by renewing her visitorship until a tenure-track position became available?"

Martin v. Howard University, et. al., No. 99-1175 (D.D.C. May 1, 2006) (Jury Verdict Form).

- Martin *did not* make satisfactory progress in her scholarship as she alleges in her petition. Pet. App. 5. Rather, the evidence at trial established that the Law School, all five members of the APT and even Martin herself were disappointed at Martin's failure to publish *any* scholarly writing during the two years she spent at the University. JEX 56; Trial Tr. 1189:7-1190:6 (JA 11983-11984),

1222:14-21 (JA 12016), 1225:2-15 (JA 12019) (Taslitz testimony); Trial Tr. 1004:1-1007:3 (JA 11798-11801) and 1043:9-16 (JA 11837); Trial Tr. 1004:8-1007:3 (JA 11798-11801) (Leggett testimony); Trial Tr. 1450:4-1452:9 (JA 12244-12246) (LaRue testimony); Trial Tr. 909:5-912:16 (JA 11703-11706) and 915:4-916:8 (JA 11709-11710) (Nolan testimony); Trial Tr. 570:6-15 (JA 11364) (Smith testimony).

- Mr. Harrison *was not* a "delusional, homeless, serial stalker with a criminal record" as Martin alleges in her petition. Pet. App. 5. Martin presented no evidence at trial to support this assertion.

- Martin was neither "fired" nor "replaced" as she alleges in her petition. Pet. App. 7, 11-12. Rather, the evidence at trial established that the University continued to employ Martin through May 15, 1998, the final date of her two-year visitorship, and even permitted her to occupy her office beyond that date to finish grading final exams and papers. JEX 32, JEX 107, JEX 108.

- The EEO position *was not* filled with "a less experienced, lower ranked" professor as Martin alleges in her petition. Pet. App. 7. Rather, the evidence at trial established that the APT unanimously recommended Professor e. christi cunningham, a talented scholar and graduate of the Yale Law School who was also an African-American woman, to fill the position. JEX 75 (JA

14044); JEX 78 (JA 14049); Trial Tr. 1043:9-16 (JA 11837) (Leggett testimony); Trial Tr. 1448:16-1451:7 (JA 12242-12245) (LaRue testimony); Trial Tr. 914:18-917:11 (JA 11708-11711) (Nolan testimony); Trial Tr. 569:13-570:15 (JA 11363-11364) (Smith testimony); Trial Tr. 1150:13-23 (JA 11944) (Taslitz testimony).

- Martin *was not* "abandoned" by her trial counsel as she alleges in her petition. Pet. App. 37-38. Rather, she fired not one, but two separate attorneys during trial. Pet. App. A-140, FN 1 ("The Court notes that during the trial Plaintiff discharged two different attorneys . . .").

Notwithstanding Martin's attempt to ignore or revise the factual record in this case, none of the 16 questions she has identified presents a persuasive reason to grant a writ of certiorari in this case.

REASONS FOR DENYING THE PETITION

This case presents no important question of federal law, nor any conflict with the decisions of this Court or any circuit court.[1] The court of appeals properly reviewed the decision of the jury and the district court in a manner consistent with the precedents of this Court and decisions of other circuits, and its conclusions are amply supported by the trial record in this case. Petitioner has improperly raised issues that were never before the jury or the courts below, and which cannot properly be raised

1. The Court of Appeals declined to revisit this appeal *en banc*. Pet. App. A-13.

now. Petitioner has raised no evidentiary or procedural issues tending to prove that the lower court has so far departed from the accepted and usual course of proceedings to require this Court to exercise its revisory power. Further review of petitioner's fact-bound challenge to the jury verdict is not warranted and the petition, therefore, should be denied.

1. The Court Of Appeals Correctly Affirmed The Sexual Harassment Verdict

In Question #14 of the 16 questions she asks this Court to review, Martin asks again whether the district court violated due process, the law of the case doctrine, or Rule 56(d)(1) when it asked the jury to resolve the disputed factual question of whether Mr. Harrison's conduct was "based on sex." Inexplicably, Martin (a licensed attorney) continues to believe that a statement made in the course of denying a motion to dismiss at the initial pleadings stage of a litigation had the legal effect of taking the factual determination of whether Mr. Harrison's conduct was "based on sex" away from the jury.[2] Martin is wrong, as has been explained multiple times during the course of this litigation, most recently in the court of appeals' decision affirming the jury's verdict:

> Ms. Martin now argues that the question of whether Harrison's behavior was based on

---

2. Similarly, Chief Judge Hogan's reference to an EEOC regulation in the same 1999 opinion (see Pet. App. 20) did not take the question of whether Martin was sexually harassed away from the jury.

Ms. Martin's gender should not have been submitted to the jury, because it was decided in her favor in Chief Judge Hogan's 1999 opinion addressing Defendants' Motion to Dismiss or Alternatively for Summary Judgment. To bolster this argument, Ms. Martin points to a 2003 Magistrate Judge's Report and Recommendation stating that the trial judge had already "concluded that [t]he alleged harassment by Harrison of the plaintiff was based on her sex."

. . .

Martin obviously misinterprets the meaning of the District Court's denial of Appellees' Motion to Dismiss or Alternatively for Summary Judgment. At that stage of the litigation, the District Court assumed the accuracy of the facts alleged by Ms. Martin and, based on her allegations, decided that it could not find as a matter of law that appellees were entitled to judgment. In other words, Chief Judge Hogan found only "that Mr. Harrison's conduct could be considered sexual harassment" and, thus, properly rejected appellees' motion to take the issue from the jury. The language in the Magistrate Judge's Report and Recommendation is admittedly inartful, but it did not (and could not) countermand the holding of the District Court. In short, in submitting the question of whether Harrison's behavior was based on Ms. Martin's gender, the District Court did

> not violate the law of the case, nor did it act in a fashion that was contrary to its 1999 decision on this matter.

Pet. App. A-5 – A-6.

The question of whether Mr. Harrison's conduct was "based on sex" was properly before the jury, and based on the facts presented to it, the jury answered that question in the negative. There is no persuasive reason for this Court to review that factual determination.

In Question #3 of the 16 questions she seeks to present to this Court, Martin asks whether a plaintiff must prove that she was "groped" or "touched" in order to prove sexual harassment. However, that issue was not presented below, nor did it form a basis for any of the findings below. In insinuating that Chief Judge Hogan required her to prove that she was "groped" or "touched" to succeed on her sexual harassment claim, Martin mischaracterizes the record. Chief Judge Hogan *never* instructed the jury that it had to find "groping" or "touching" in order to find sexual harassment. In fact, the district court made clear that physical contact, such as "groping" or "touching" is *not* necessary to prove sexual harassment:

> Although specific actions [groping, touching, or making sexual advances] are not necessary for a finding of a hostile work environment, here it was reasonable for the jury to find that even considering the conduct that did occur, for example the content of Mr. Harrison's letters and voicemails, including his statement

> that he was looking for his wife, that his conduct was not sexual in nature and was not because of Plaintiff's gender.

Pet. App. A-147. Martin's misleading complaints about the district court's use of the words "groping" and "touching" in its Memorandum Opinion were briefed and argued on appeal and the court of appeals rightly found no abuse of discretion, and that the district court's jury instructions were proper and correct. Pet App. A-9 – A-10.

In Questions #4 and 5 of the 16 questions she raised in her petition, Martin argues there is (or should be) a *per se* rule that Mr. Harrison's conduct constituted sexual harassment. On pages 4, 13 and 23 of her petition, Martin states in conclusory fashion that the decision of the court of appeals creates a split in the circuits regarding civil rights issues, yet she fails to explain in detail what those issues are, and fails to cite to a single case in support of her contention. Martin even goes a step further to argue that other circuits have found *per se* harassment when presented with facts similar to those in this case, but again does not (and cannot) support that contention with any case law. The one case that Martin does cite – this Court's decision in *Oncale v. Sundower Offshore Svcs., Inc.*, 523 U.S. 75 (1998) – lends nothing to her argument. Consistent with *Oncale*, the jury in this case considered the unique facts presented, including the fact that Mr. Harrison mistakenly identified Martin as someone he thought he once knew, and the fact that Mr. Harrison had allegedly "stalked" *both men and women*. The difference in outcomes among the cases Martin relies on and the jury's verdict in her own case are simply the result of

applying the same, well-established legal standard to different facts. This case involved ample evidence from which the jury concluded that Martin had not proven that Mr. Harrison's conduct was "based on sex." As the court of appeals explained in affirming the jury's verdict:

> There was ample evidence — including the fact that Harrison had stalked at least one man in the past — from which the jury could have concluded that Harrison's conduct was not based on Ms. Martin's gender. Indeed, the jury reasonably may have concluded that Harrison's stalking was attributable to his misidentification of Ms. Martin as his wife, not bad behavior based on Ms. Martin's gender.

Pet. App. A-7 – A-8. Notably, the court of appeals determined that it did not have to confront the issue of whether stalking is *per se* sexual harassment:

> We need not decide whether and under what circumstances stalking might amount to harassment "based on gender." Rather, we merely hold that on the facts of this case, the jury's verdict must stand.

Pet. App. A-8. This Court need not (and should not) confront that issue either, at least not on the instant set of facts, or before the lower courts have fully explored the issue. Nothing in the lower courts' statements of the relevant legal standard or the application of that standard to the particular facts in Martin's case indicates any division among the circuits on the legal issue.

Martin, in essence, presses a fact-bound dispute over the sufficiency of evidence presented to the jury in this case. Further review of that claim is not warranted. Martin's petition for review of the jury's verdict on her sexual harassment claim should be denied.

2. The Court of Appeals Properly Reviewed The Disposition of Martin's Retaliation Claims

In Question #2 of the 16 questions she asks this Court to consider, Martin asks whether a victim of sexual harassment must use certain "magic words" to establish retaliation for reporting such harassment. In so doing, Martin again improperly mischaracterizes the record on appeal. The district court did not require Martin to prove to the jury that she had used certain "magic words" to report sexual harassment. On the contrary, the district court specifically instructed the jury that "*[t]here are no 'magic words' necessary* to invoke Title VII protection. It is enough to report the conduct constituting sexual harassment and to ask the employer to stop it." Trial Tr. 2401:3-6 (JA 13296) (emphasis supplied). The jury was never instructed that Martin had to use "magic words." The court of appeals rightly found that the district court's jury instructions were proper and correct. Pet App. A-9 – A-10.

At trial, Martin was given the opportunity to present evidence to the jury to try to prove that she had engaged in activity protected under Title VII. Among other evidence, the jury saw that, in her own letters and memoranda, Martin – a self-described "national EEO expert" – never alerted the University that she perceived Mr. Harrison's attempts to contact

her to be sexual harassment; instead she consistently referred to Mr. Harrison in her communications with the University as a "security problem." Pet. App. A-164 – A-181. The jury also heard testimony that Martin never invoked the University's anti-harassment policy. JEX 2 (JA 13479); Trial Tr. 786:17-788:6 (JA 11580-11582). On this record, it was reasonable for the jury to conclude that Martin *had not* engaged in protected activity or put the University on alert that she perceived Mr. Harrison's conduct to be sexual harassment. Martin v. Howard University, et. al., No. 99-1175 (D.D.C. May 1, 2006) (Jury Verdict Form).

In Question #6 of the 16 questions she asks this Court to review, Martin contends that the court of appeals erred in affirming the district court's dismissal of her claim that the University retaliated against her by allegedly "converting" a Constitutional Law/Civil Rights teaching position into a Tax position. Martin claims that the court of appeals' decision not to reinstate these retaliation claims violated this Court's decision in *Burlington Northern v. White*, 548 U.S. 53 (2006) and conflicts with decisions in other circuits. Pet. App. 32-33. Martin is incorrect.

As an initial matter, review of this issue is unnecessary because, as the court of appeals found, all of Martin's alleged retaliation claims were mooted "because the jury reasonably found that Ms. Martin had not engaged in protected activity" and therefore, "the necessary predicate for her claims of retaliation is missing." Pet. App. A-9. For this reason alone, Martin's petition should be denied.

Moreover, even if the jury had reached the question of retaliation, it was proper and in line with *Burlington* and other applicable decisions for the district court to narrow that claim because, as held in *Burlington*, Title VII "cover[s] those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant." 548 U.S. at 57. The University's decision to hire a Tax professor instead of opening up the hiring process again to seek applicants to teach Constitutional Law/Civil Rights Law could not have dissuaded or deterred a reasonable law professor in Martin's shoes from engaging in protected activity. It was proven at trial that, in the fall of 1997, Martin had not even applied for the vacant Constitutional Law/ Civil Rights position, but only for the EEO/Labor Law position. Martin first applied for a Constitution Law/ Civil Rights position by memorandum dated March 6, 1998, months after the APT had made its decision to recommend Professor Cunningham (not Martin) for the EEO/Labor Law position. JEX 87, p. 1 (JA 14140) ("I recently learned from a friend at the Department of Justice (DOJ) that Reginald Robinson, [sic] (of DOJ) did not accept Howard's offer to fill the Constitutional Law/ Civil Rights position. Since presumably, this position is still unfilled, I ask that I be considered for it."). Based on the specific facts presented here, the district court correctly reasoned that no reasonable law professor in Martin's position in the Fall of 1997, when she alleges she had been harassed by a homeless man, would have been dissuaded from making a sexual harassment claim based on the fear that several months later, a teaching position for which she had never applied, never expressed an interest in filling, and never asserted she

was qualified to teach, might be unfilled in favor of filling an unanticipated teaching need.

In *Burlington*, this Court set a standard that is inherently factual in nature. While Martin may be disappointed that the lower court found that the alleged harm caused by the purported conversion of the Constitutional Law/Civil Rights Law teaching slot to a Tax Law slot was not adverse enough to be actionable, she cannot turn that disappointment into an alleged conflict with the decisions of this Court or other circuits. Here, the district court properly applied the correct legal standard to the facts. The court of appeals applied the correct legal standard in affirming the district court's grant of summary judgment. Further review is not warranted.

In her preliminary statement, Martin seems to be asking this Court to extend Title VII to "explicitly protect[s] an employee from being fired for being stalked."[3] Pet. App. 11. In so doing, Martin seeks to graft onto the federal anti-discrimination statute issues that are more properly within the purview of state common law, namely premises liability and workplace safety matters. Existing federal law properly protects employees from retaliation in response to reporting bona fide sexual harassment. Martin was simply unable to prove to the jury based on her unique set of facts that the University violated those laws.

---

3. Even if such a statute existed, as discussed above, it would not apply to Martin because she was not fired. Martin had no contractual right to work at the University beyond May 15, 1998, the date her two-year visitorship ended.

3. Petitioners' Remaining Arguments Provide No Basis For Further Review

In Questions #1 and #10 of the 16 questions she seeks to present, Martin suggests that a disparate impact or wrongful termination theory should be applied to overturn the jury's verdict.[4] However, Martin did not present either theory in the case below. Because these theories were never before the jury or the trial or appellate courts, they should not be evaluated for the first time here. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). Moreover, the facts below would not have supported either theory given that the evidence at trial established that Mr. Harrison stalked both men and women and that Martin was never "terminated."

In Question #7 of the 16 questions set forth in the petition, Martin claims that the lower courts should have found a violation of the Age Discrimination Employment Act (ADEA), 29 U.S.C. § 621-634, *et seq.*, based on a witness' trial testimony regarding the APT's judgment in recommending Professor Cunningham, rather than Martin, for the open EEO/Labor Law position, in which the witness likened Martin to a "veteran" quarterback and Professor Cunningham to a promising "rookie." Martin's Complaint did not include an ADEA claim and at no point after the witness testified did she attempt

---

4. Martin also states in this Question that "80% of stalking victims are women." The University notes that the percentage of female stalking victims was not a fact presented to or resolved by the jury or the courts below and Martin presents no evidence here to support her conclusory statement.

to amend her pleadings to include such a claim. The matter was never tried before the jury and was not properly before the Court of Appeals. *Singleton*, 428 U.S. at 120. The court of appeals did not err in rejecting Martin's belated attempt to add an ADEA claim to her case.

Finally, in Questions #8, 9, 12, 13, 15 and 16, Martin raises a variety of challenges to the evidentiary and procedural decisions the district court reached during trial, as well as other perceived affronts and general woes. All of these issues were before the court of appeals which found no abuse of discretion (Pet. App. A-9) and none are worthy of certiorari here:

- The district court had not yet taxed the University's litigation costs against Martin at the time of the court of appeals' decision. Because the court of appeals has not yet had a chance to address this issue, it is not proper to raise it for the first time in a petition of certiorari.

- The district court did not leave sanctions against Howard "forever in 'abeyance." In 2002, Magistrate Judge Facciola warned the University that it *could* be sanctioned with regard to its discovery responses. However, as Martin herself admits in her petition, no sanctions were ever ordered. There is no court order requiring Howard to pay any sanctions and therefore Martin is not entitled to any.

- The district court did not err in requiring Martin to formulate questions to herself (instead of narrating from the stand) after she fired two different trial attorneys during the course of the trial and insisted on conducting her direct examination herself. The district court has the discretion to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence." Fed. R. Evid. 611(a). Here, the district court, in the sound exercise of its discretion, determined that Martin would not be permitted to testify in a narrative form, but rather, would be required to ask herself questions so as to preserve the University's ability to object to improper testimony.

- At no point did the University or its counsel commit perjury or fraud. In fact, the court of appeals denied both of Martin's voluminous motions seeking sanctions against the University and its counsel for what she claimed to be false statements made during trial, in the University's briefs and during oral argument before the court of appeals, and then directed the Clerk not to accept any further motions from Martin concerning sanctions or the reconsideration of sanctions. Pet. App. 14 – 16.

- Professor Gavil testified at trial and, obviously, Martin did not like what he had to say. However, the district court did not err in allowing this testimony. While Professor Gavil's deposition testimony was precluded at the summary judgment stage, there was no order precluding

him from testifying at trial. At trial, Martin objected to Professor Gavil testifying about her bad judgment and her objection was overruled. Trial Tr. 2214:23-2218:1 (JA 13109-13113). The district court's ruling on Martin's objection presents no legitimate basis for granting certiorari.

CONCLUSION

The lower court's decisions are consistent with this Court's precedents, decisions in other circuits and common sense. There is no legitimate reason – legal, evidentiary, procedural or otherwise – to revisit the district court's rulings or the jury's verdict in the case below. For all of the foregoing reasons, Martin's petition for a writ of certiorari should be denied.

Respectfully submitted,

BRIAN L. SCHWALB
Counsel of Record
KISHKA-KAMARI M. FORD
VENABLE LLP
575 7th Street, NW
Washington, D.C. 20004
(202) 344-4823

Counsel for Respondent
Howard University